



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20420

MAR 19 2014

In Reply Refer To: (0141 A1)

Dear Appellant:

The Board of Veterans' Appeals has made a decision in this case, and a copy is enclosed. The records are being returned to the Department of Veterans Affairs office having jurisdiction over this matter.

Sincerely yours,

A handwritten signature in cursive script that reads "Bruce P. Gipe".

Bruce P. Gipe
Director, Office of Management, Planning
and Analysis

Enclosures (1)

cc: VFW



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20420

IN THE APPEAL OF

DOCKET NO. 11-13 500

DATE

MAR 19 2014

On appeal from the

Department of Veterans Affairs Regional Office in White River Junction, Vermont

THE ISSUE

Entitlement to an effective date prior to September 24, 2012 for a total rating for compensation based on individual unemployability (TDIU) due to service-connected disabilities.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

A.G. Alderman, Counsel

INTRODUCTION

The Veteran served on active duty from December 1965 to September 1967.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a November 2010 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in White River Junction, Vermont, which denied entitlement to TDIU. Subsequently, the RO granted TDIU from September 24, 2012. Since TDIU was not granted from the date of claim, the Veteran's claim has not been fully satisfied and is before the Board for adjudication.

The Board has reviewed the Veteran's physical claims file and file on the "Virtual VA" system to insure a total review of the evidence.

FINDING OF FACT

The Veteran filed a claim for TDIU in August 2010 but met the schedular criteria and was deemed unable to work due to service-connected disabilities as of May 3, 2010.

CONCLUSION OF LAW

The criteria for an effective date of May 3, 2010, for the award of TDIU have been met. 38 U.S.C.A. §§ 5107, 5110 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.1(p), 3.400 (2013).

REASONS AND BASES FOR FINDING AND CONCLUSION

The United States Department of Veterans Affairs (VA) has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a).

In this case, the Board is granting in full the benefit sought on appeal. Accordingly, assuming, without deciding, that any error was committed with respect to either the duty to notify or the duty to assist, such error was harmless and will not be further discussed.

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that if there is only one such disability, such disability shall be ratable as 60 percent or more and if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more and sufficient additional disability to bring the combined rating to 70 percent or more. 38 C.F.R. § 4.16(a).

Even if the ratings for a veteran's disabilities fail to meet the first two objective bases upon which a permanent and total disability rating for compensation purposes may be established, a veteran's disabilities may be considered under subjective criteria. If a veteran is unemployable by reason of his disabilities, occupational background, and other related factors, an extraschedular total rating may also be assigned on the basis of a showing of unemployability alone. *See* 38 C.F.R. § 4.16(b)

The Veteran maintains that he is entitled to an effective date earlier than September 24, 2012 for the award of TDIU benefits. Generally, the effective date of an award based on a claim for increase of compensation shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore. 38 U.S.C.A. § 5110(a). An increase in disability compensation may be granted from the earliest date on which it is factually ascertainable that an increase in disability occurred if the claim for increase is received within one year from that date. 38 U.S.C.A. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2). When the increase in disability occurred prior to one year from the date of filing, an effective date of award cannot be awarded prior to the date of the application. *Harper v. Brown*, 10 Vet. App. 125, 126-27 (1997); 38 C.F.R. § 3.400(o)(2); VAOPGCPREC 12-98 (Sept. 23, 1998).

A TDIU claim is also a claim for increased compensation and, therefore, the effective date rules for increased compensation claims apply to a TDIU claim. *Hurd v. West*, 13 Vet. App. 449 (2000).

Here, as of May 3, 2010 the Veteran met the schedular criteria for TDIU. His service connected disabilities at that time included ischemic coronary artery disease, bilateral lower extremity neuropathy, diabetes mellitus type II with cortical lens opacities, erectile dysfunction, and pulmonary embolism. His total combined rating was 80 percent.

In support of a finding that the Veteran is unemployable due to his service-connected disabilities, the Veteran submitted a note from his primary care provider indicating that he had been unemployable since May 2010 due to his heart disease, which is service-connected, and his lung cancer, which is not service-connected.

A July 2010 VA examination report addressing the heart and diabetes mellitus indicates that the Veteran could walk a mile a day without shortness of breath or retrosternal discomfort. He reported numbness and tingling of his toes. The examiner stated that the diabetes mellitus did not interfere with the quality of his daily life; however, the examiner did not address whether either disability interfered with activities of daily living or employment. At most the examiner noted that the Veteran had not worked since the coronary bypass graft in May 2010. In September 2010, the Veteran submitted a statement from his former employer which indicates that he left employment in May 2010 after nine years due to his heart condition, his inability to stand for long periods or work without numbness in the toes and legs, and due to treatment for cancer.

In his VA Form 9, substantive appeal, the Veteran addressed the VA examination report and conceded that he walks a mile a day but noted that he has to stop every 15 minutes to rest because his toes and legs go numb. After resting 10 minutes, he continues. He pushes himself to walk because his doctor said it is important; however, he stated that he cannot stop working every 15 minutes to rest. He maintains that the neuropathy makes it impossible for him to work.

The Veteran had a VA examination in July 2013. The Veteran reported that after his heart surgery in 2010 he tired more easily and took 6 months off work to recuperate. However, he was unable to return to his job as a millwright because he was unable to lift and move machinery or repair it. The examiner said he should have been able to perform sedentary work if it was available. Regarding neuropathy, the Veteran reported having neuropathy of the hands and feet. He had difficulty ambulating because of the lack of feeling in his feet. The examiner opined that the Veteran would not be able to perform equipment repair due to mild sensory loss in his hands and worse loss in his feet. The examiner opined that the Veteran would not be able to work in any position in manual labor or sedentary work due to the severity of the neuropathy.

The Board acknowledges that service connection for neuropathy of the bilateral upper extremities was not effective until September 2012. The Board also recognizes that the VA examiner found that the Veteran should have been able to perform sedentary work after his heart surgery had it been available. However, the Board must take into consideration all of the Veteran's service-connected disabilities during the relevant period as well as his educational background and employment history. As noted above, the evidence shows that the Veteran worked for nine years as a millwright, which is a labor intensive occupation. His occupational and educational background does not suggest that he was engaged in or suited for sedentary work as of May 2010. Further, the evidence does not show that he could have obtained and sustained substantially gainful sedentary employment. Here, the medical and lay evidence supports a finding that he could no longer perform a labor intensive occupation due to his service-connected heart condition and neuropathy of the bilateral lower extremities as of May 2010. This finding is supported by the note from the Veteran's primary care provider, the statement from his employer, his personal statements, and the July 2013 VA examination.

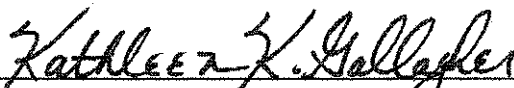
Because the Veteran met the schedular criteria for TDIU as of May 3, 2010, because that date is within one year prior to the date he filed his claim for TDIU, and because the evidence shows that he was unemployable as of May 3, 2010, the

IN THE APPEAL OF

Board finds that the Veteran is entitled to TDIU as of May 3, 2010. The appeal is granted.

ORDER

An effective date of May 3, 2010 for entitlement to TDIU is granted.

A handwritten signature in cursive script, reading "Kathleen K. Gallagher", is written over a horizontal line.

KATHLEEN K. GALLAGHER

Veterans Law Judge, Board of Veterans' Appeals